NASHARUDDIN NASIR

v.

KERAJAAN MALAYSIA & ORS

HIGH COURT MALAYA, SHAH ALAM
SURIYADI HALIM OMAR J
[CRIMINAL APPLICATION NO: 44-11-2002]
18 JUNE 2002

CONSTITUTIONAL LAW: *Fundamental liberties - Right to counsel - Detention under s. 73(1) Internal Security Act 1960 - Denial of access to legal representation - Whether a breach of art. 5(3) Federal Constitution - Exercise of right to counsel, whether subject to discretion of police - Mala fide on part of police, burden of proof on detainee - Whether Federal Constitution or Internal Security Act 1960 contains any provision proscribing access to legal representation - Distinction between 'right of non-disclosure' and 'right to legal representation'*

PREVENTIVE DETENTION: *Internal Security Act - Detention - Right to counsel - Denial of access to legal representation - Whether a breach of art. 5(3) Federal Constitution - Exercise of right to counsel, whether subject to discretion of police - Mala fide on part of police, burden of proof on detainee - Whether Federal Constitution or Internal Security Act 1960 contains any provision proscribing access to legal representation - Distinction between 'right of non-disclosure' and 'right to legal representation'*

Nasharuddin Nasir ('the applicant') was arrested and detained by the police under s. 73(1) of the Internal Security Act 1960 ('ISA') on 17 April 2002 and was, thenceforth, denied access to legal representation. The instant prayer by the applicant was for an order of the court allowing him to have access to his solicitors. In support of the prayer, it was contended that the denial of access had impeded the applicant's solicitors in the discharge of their duties as they were unable to obtain instructions from the applicant.

Held:

[1] The constitutional right of a detainee "to consult and be defended by a legal representative of his choice", as enshrined in art. 5(3) of the Federal Constitution, would be meaningless if he could simply be denied access to legal representation by 'an over-zealous, ill-informed administrator'. Article 5(3) of the Federal Constitution does **not** expressly or impliedly authorise the police to deny detainees such as the applicant access to legal representation. (p 348 g)

[2] The 'right of non-disclosure' under s. 16 of the ISA and art. 151(3) of the Federal Constitution is distinct and separate from the 'right to legal representation' entrenched in art. 5(3) of the Federal Constitution. (*Mohamad Ezam Mohd Nor & Ors v. Inspector General of Police* [2001] 3 CLJ 198 HC not followed). (pp 349 h & 350 a)

[3] The time at which a detainee may exercise his right "to consult and be defended by a legal representative of his choice" has to be left to the 'good judgment' of the detaining authority or police. (Following *Theresa Lim Chin Chin & Ors v. Inspector General of Police* [1988] 1 MLJ 293; [1988] 1 LNS 132 SC). The detainee may, however, show that the police has violated art. 5(3) of the Federal Constitution; the burden is on the detainee to show *mala fide* on the part of the police in denying him his right to legal representation. (p 350 d)

[4] The fact that the police had allowed the applicant's family to visit him on a few occasions but refused to let his solicitors do the same showed that the police was "deliberately discerning", "coldly calculative" and 'questionably selective' in its motives. This showed mala fide on the part of the police. (pp 351 c-h & 352 a-d)

[Prayer for access to solicitors granted.]

Case(s) referred to:

Karam Singh v. Minister of Home Affairs [1969] 2 MLJ 129 ***(refd)***

Mohamad Ezam Mohd Nor & Ors v. Inspector General of Police [2001] 3 CLJ 198 HC ***(not foll)***

Ooi Ah Phua v. Officer-in-Charge of Criminal Investigation, Kedah/Perlis [1975] 2 MLJ 198 ***(not foll)***

Saul Hamid v. PP [1987] 2 CLJ 257; [1987] CLJ (Rep) 967 ***(dist)***

Theresa Lim Chin Chin v. Inspector General of Police [1988] 1 MLJ 293; [1988] 1 LNS 132 SC ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 117
Federal Constitution, arts. 5(3), 151(3)
Internal Security Act 1960, ss. 8, 16

For the applicant - En Sivarasa (Ranjit Singh & KY Ho); M/s Saiful Kasri & Assoc
For the respondants - Kamaluddin Mohd Said

[Editor's note: For a recent pronouncement by the Federal Court on the right to legal representation whilst in detention under s. 73 of the Internal Security Act 1960, please see the judgment of Siti Norma Yaakob FCJ in Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals [2002] 4 CLJ 309 FC.]

Reported by Gan Peng Chiang

JUDGMENT

Suriyadi Halim Omar J:

The factual matrix of the case revealed that the detainee was arrested on 17 April 2002, with access to his solicitors having been denied by the police, as reflected in its reply letter. The refusal letter dated 10 May 2002 was in reply to his solicitors' letter of 3 May 2002.

Found in encl. 8 it reads as follows:

> SAIFUL KASRI &. ASSOCIATES,
> Advocates & Solicitors,
> Peguambela & Peguamcara,
> Suite 6.08B,
> 6 Floor, Wisma Central,
> 50450 Jalan Ampang,
> KUALA LUMPUR.
>
> Tetuan,
>
> Penahanan Nasharuddin bin Nasir di bawah Akta Keselamatan Dalam Negeri (AKDN) 1960
>
> Dengan hormatnya surat tuan dalam bilangan SKA/SMN/LIT 124/02 (SIR) bertarikh 3 Mei 2002 adalah berkaitan.
>
> Saya telah mempertimbangkan permohonan tuan untuk melawat anakguam tuan. Memandangkan siasatan ke atas anakguam tuan masih di peringkat awal dan melibatkan perkara-perkara keselamatan Malaysia serta bagi mengelakkan sebarang gangguan yang mungkin boleh menjejaskan kelancaran siasatan tersebut dukacita dimaklumkan kebenaran lawatan tidak dapat diberi pada waktu ini.
>
> Sekian, terima kasih
>
> 'BERKHIDMAT UNTUK NEGARA'
>
> Saya yang menurut perintah,
>
> t.t
>
> (DATO' HJ MD LAZIM BIN HJ AHMAD)
>
> bp Pengarah Cawangan Khas
> bp Ketua Polis Negara

(In a gist and loosely interpreted, the above second paragraph would read as follows:

I have considered your application to visit your client. Bearing in mind that the investigation of your client is still at the early stages, which pertained matters of Malaysian security, and to avoid any disaffections that could derail a smooth investigation, it is with regret that permission cannot be granted at this stage.)

With that refusal, the solicitors for the detainee alleged that their work was impeded due to their inability to obtain precise instructions, and hence unable to discharge their duties. What ensued was the notis usul (encl. 1), which not only prayed for the right of access by solicitors to see the detainee under the first prayer, but also the substantial order of *habeas corpus*. Due to the consequential effect of the first prayer, the applicant at the outset had applied that it be dealt with first, before proceeding with the other prayers, a request that I thought was quite reasonable in the circumstances of the case. On that understanding, unless otherwise stated, I would be focusing my discussion only on this access aspect in this judgment.

In a gist this first prayer entailed the taking of instructions by the detainee's solicitors, for the purpose of smooth passage when discharging their duties during the stage of the investigation, ie prior to the issuance of any detention order under s. 8 of the Internal Security Act 1960. The basis of this application of access adverted to by the detainee was art. 5(3) of the Federal Constitution.

The first question posed by me that needed immediate attention by the respondent, was whether the police, after having arrested the detainee could legally prevent the detainee's solicitors from seeing him. Under art. 5(3) of the Federal Constitution, it is quite clear that a detainee after having been arrested is entitled to legal representation. The consequential question that flowed will be when or at what stage may his lawyers meet up with him, to put into effect that constitutional right.

It is indisputable that, the right of legal representation would be meaningless if a detainee were to be denied of access to professional assistance, due to some overzealous but ill-informed administrator. Having scrutinized the above art. 5(3) I failed to identify anywhere in it, expressed or inferred, which authorized the police to deny that access. In fact, the learned senior federal counsel to his credit even admitted that he likewise failed to identify any relevant provision that empowered the police to issue the letter of 10 May 2002. He could only allude to case laws for assistance.

To appreciate the problem at hand, it is quite necessary for me to trace slightly the historical route of a detainee, in his battle to be allowed to consult a lawyer to represent his interest. I will begin with *Ooi Ah Phua v. Officer-in-Charge of Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198 which propounded

that the right of an arrested person to consult his lawyer began from the moment of arrest, but such right not being exercisable immediately after that arrest. A balance had to be struck between the right of the detainee, and any investigation undertaken by the police, simultaneously mindful of the interest of the public.

In the process of its submission, the detainee attempted to press on the suggestion that in the circumstances of the case, the police should have supplied cogent evidence to justify the rejection of the access application. The case alluded to was that of *Saul Hamid v. PP* [1987] 2 CLJ 257; [1987] CLJ (Rep) 967. The detainee ventilated the views propounded by Edgar Joseph Jr J (as his Lordship then was), when discussing the right of a suspect to consult counsel, at the stage of s. 117 of the Criminal Procedure Code. The court there had suggested that in the event access was rejected, the police was required to adduce sufficient evidence to convince a legal mind that there were substantial grounds to support the objection. Having reviewed the above case, it was my view that it was irrelevant, as the issue at hand was conspicuously distinguishable with the matter discussed there. If I may add further, to expect the police to adduce that cogent evidence would mean that the burden of proof would have shifted to them. This stance would be in total disagreement with the case of *Theresa Lim Chin Chin v. Inspector General of Police* [1988] 1 MLJ 293; [1988] 1 LNS 132 SC, where Salleh Abas LP at p. 297, had occasion to remark:

> When should a detainee arrested under s. 73 of the Internal Security Act be allowed to exercise his right under art. 5(3) of the Constitution to consult a counsel of his choice? We would reiterate what was held by the Federal Court in *Ooi Ah Phua v. Officer-in-Charge, Criminal Investigations, Kedah/Perlis.* In other words, the matter should be best left to the good judgment of the authority as when such right might not interfere with police investigation. To show breach of art. 5(3), an applicant has to show that the police has deliberately and with bad faith obstructed a detainee from exercising his right under the Article (emphasis added).

Before arriving at some conclusion on the current legal poser, it is also quite necessary for me to touch on the case of *Mohamad Ezam Mohd Nor & Ors v. Inspector General of Police* [2001] 3 CLJ 198, as it was brought to my attention by the respondent's representatives. Touching only on the relevant part under discussion, the High Court there had opined that the right to legal access of a person detained under the Internal Security Act must be considered in the light of art. 151(3) of the Federal Constitution and s. 16 of the same Act. The court eventually concluded that denial of legal access to a detainee till the police decided that it was appropriate to do so, was to achieve the object of the provisions permitting non-disclosure of facts. Having perused art. 151(3) of the Federal Constitution and s. 16 of the Internal Security Act, it is

my view that they are provisions that bestow a privilege on the authorities whether to release or not the information, subject to it not being against national interest. The issue of disclosure of information *vis-a-vis* the constitutional right of a detainee to have access to counsel are two totally separate and distinct matters. Article 5(3) distinctly deals with the constitutional right of a detainee to consult a lawyer whilst art. 151(3) and s. 16 of the Internal Security Act deal with the right of the authorities to disclose information, which will not be against national interest.

As a High Court judge is subject to the principle of *stare decisis*, I am therefore bound by the above view of Salleh Abas LP in *Theresa Lim Chin Chin v. Inspector General of Police*. From the latter case, in relation to the limited matter under discussion, I have summarized the relevant portion to be, that:

1. the Federal Court agreed that the right to consult a counsel of his choice is entrenched in art. 5(3) of the Federal Constitution;

2. when a detainee may exercise his right to consult a counsel of his choice will be left to the good judgment of the police;

3. the onus of showing a breach of art. 5(3) rested on the shoulders of the applicant; and

4. that it is the detainee who must prove that the police had acted in bad faith in obstructing the detainee from exercising his right.

From the above, the scenario that may be gauged on the legal playing field will be as follows:

Both the police and the detainee know that the latter has an entrenched constitutional right under art. 5(3) to consult a lawyer of his choice. In the event he desires to see that lawyer, an application as in the current case, will have to be made. Regardless of that guaranteed promulgated right, ironically the police then will decide, to grant that access or not. To pour salt on the wound, the ball then will dramatically roll to the detainee's court whereby he will have to allege that art. 5(3) had been breached when a rejection had occurred. Following the above view of *Theresa Lim Chin Chin*, there is no necessity for the authorities to justify the rejection of the access application. Yet by analogy, the authorities in *Karam Singh v. Minister of Home Affairs* [1969] 2 MLJ 129 was required to justify the detention after a complaint had been received that the impugned detention was illegal. Once the detention order pursuant to law had been produced, with it being proved authentic and done in good faith, the onus then shifts back to the detainee to show bad faith on

the part of the detaining authorities. The ironic twist in the current case is that, despite the non-requirement of the police to justify the arrest, running counter to *Karam Singh* rationale (and an issue for future consideration by superior courts), the onus still remains on the detainee to prove *mala fide* on the part of the police. Not only must he be a mind reader and speculate on the reasons of the rejection, but must prove *mala fide* without help from them. With near nothing to start off, and trapped within the confines of the inscrutable faces of his jailors, he might as well throw in the towel. Thankfully, the only avenue still left unplugged is that there are no inhibitive case laws or statutory provisions that restrict the manner of proving that *mala fide* factor.

Taking the cue from the last remark, I had to sieve the evidence and decide whether the detainee had indeed successfully proved it. Let us now sift the evidence. It was undeniable that on 6 May 2002 the detainee's family was allowed to see him for about forty minutes. In open court his counsel further related that apart from that visit, his family had been able to see him a couple more times, prior to the hearing. This factor had a profound effect on the bearing of the case as I found that the arbitrary attitude of the police permitting the family, but not his solicitors was disconcerting to say the least. Surely in that circumstance, legal advice would have been more imperative and beneficial to the detainee, rather than a social visit from his family. Even though some temporary reprieve to his peace of mind could be attained by the presence of his immediate family, surely permanent freedom would have been uppermost in his mind at that stressful moment. I could not help but conclude that the coldly calculative selection and motive of the police was already questionable at that stage. By being deliberately discerning, the police had deprived him of prompt professional advice at such a crucial moment bearing in mind that the incarceration of a person not in accordance with law, however short must not be condoned.

Furthermore, if lawyers may impede or derail police investigations, why not his relatives who may be more persuasive and troublesome? I failed to find any presumption provisions, or arrive at some sensible conclusion that lawyers have a higher propensity to be meddlesome, and a greater threat to the security of this country at that stage of the police investigation.

Apart from the above analysis, the very contents of the letter of 10 May 2002 was confusing as the refusal of that access, was with the intention of avoiding any derailment of a smooth investigation. What investigation? Did the letter mean that an ongoing investigation was still in process, which pertained the general security of Malaysia, or the detainee was a threat to the country, or no grounds had yet been identified to justify the arrest? Surely the contents of this letter was a contradiction in terms, as it is trite that the moment a

detainee is arrested, the police already had the grounds to do so. In that sense how could access to lawyers impede any investigation pertaining to his involvement with security threats, when investigations had already resulted in the amassing of facts on which the satisfaction of the police was based prior to his arrest, hence the availability of grounds to arrest him? Having grounds which are conclusions drawn from those facts, eventually prompting that arrest, and when the detainee ought to be informed of the arrest are two totally different matters, and they ought not to be confused. If ever additional investigation was needed it would have been merely to tie up loose ends in the gathered facts. No new grounds surfacing after the arrest could assist the authorities, as they could not have been the grounds to satisfy them in the first instance, when placing the detainee under custody.

As it is not required that the detainee must prove its assertion beyond reasonable doubt, what with the sufficiency of the above factors, I had no difficulty in arriving at the conclusion that the police had indeed acted in a *mala fide* manner here. The consequential order that flowed was that 'order in terms' was granted to the first prayer.

Without intending to appear too shaken by the behavior of certain unidentified person or persons in the police force, it was quite regretful to be informed that the detainee's counsel had failed to meet up with him at 2.30pm the next day despite my order, on the ground that he had been carted off to hospital on some medical pretext. His family through counsel had informed me that he, in his entire adult life, had never fallen ill, serious enough to warrant a visit to the hospital. This providential co-incidence of being struck by illness on the appointed hour, and thus be deprived of the chance of securing redress at the earliest opportunity, surely would exacerbate matters and cause more consternation in the minds of ordinary citizens. The noble intention of arresting unsavory characters, with the sole purpose of ensuring permanent stability in Malaysia, surely has the backing of all right-minded citizens. But let not the very people who are supposed to be our protectors, go overboard and end up hijacking the hard-earned democratic processes, to the extent of sidelining a court order. It will be the lowest ebb in the history of the judiciary comes the day when a perfectly legitimate court order may be contemptuously, but legally avoided by certain irresponsible persons who are endowed with certain specialized skills. The good name of the police force, held in high esteem by the public, might also be besmirched due to the questionable *modus operandi* of a few recalcitrant members. Any repetition of this absurd antic in future will only vindicate my fears.